

Date of Decision:11-1-96

Special Civil Application No.6686 of 1995

For Approval and Signature:  
corrected

HONOURABLE MR. JUSTICE M.R. CALLA

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any other order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Mr.Rajesh D.Dave, learned counsel for the petitioner.  
Mr. P.J.Patel, learned counsel, for Mr.V.H.Desai,  
learned counsel for the respondent Nos.1 and 2.

Coram: (M.R. Calla, J.)

Date: 11-1-1996

ORAL JUDGMENT:

1. Rule. Mr.P.J.Patel, learned counsel, waives service of Rule on behalf of respondent Nos.1 and 2.
2. On the request of both the sides, the matter is taken up for final hearing today.
3. The petitioner, who was working as a conductor with Gujarat State Road Transport Corporation, was sought to be dismissed after an inquiry and an order of dismissal was passed on 14-10-93. In view of the fact

that certain disputes concerning the petitioner were pending at the time of passing the order, the Corporation moved an application seeking approval of the dismissal order under S.33(2)(b) of the Industrial Disputes Act, 1947 (herein-after referred to as 'the Act') before the Assistant Commissioner of Labour. The application was opposed by the petitioner on several grounds including the ground that the mandatory requirement under the proviso to S.33(2)(b) had not been followed and the payment made for one months' wages was falling short by a sum of Rs.60.45 Ps. as an amount payable on account of increment for the month of September, 1993 on the basis of the order dated 13-10-93 passed in favour of the petitioner granting increment with effect from 1-9-93. In the order dated 13-10-93 the petitioner's name was at Sr.No.66 and his basic salary is raised to Rs.883/- from 1-9-93 and accordingly the due amount for the month of September, 1993 was Rs.2157.45 Ps., but he was paid a sum of Rs.2097/- only at the time of the dismissal vide order dated 14-10-93 and thus it was a case of short payment for a sum of Rs.60.45 Ps. The approval application moved by the Corporation was, therefore, rejected on 31-12-94 by the Assistant Commissioner of Labour on the short ground that the payment was short of the due amount for one month's wages and it was a case of breach of proviso under S.33(2)(b). The petitioner preferred the present Special Civil Application on 10-3-95 and after the service of the notice of this Special Civil Application, during the pendency of the same and after filing a reply dated 22-11-95 in this petition, the Corporation preferred Special Civil application No.10640 of 1995 challenging the rejection of the approval application vide order dated 31-12-94 . That Special Civil Application No.10640 of 1995 preferred by the Corporation has been rejected. In this Special Civil Application the petitioner has sought the relief by seeking a direction against respondent Nos.1 and 2 to reinstate him with continuity of service and full backwages as if he has never been dismissed and the contention has been raised that once the approval has been rejected, the dismissal order had become inoperative from the date it was passed and the petitioner is entitled to reinstatement with continuity and the wages for the entire period.

4. Mr. P.J.Patel appearing for the Corporation has placed reliance on AIR 1978 S.C.995 (Punjab Beverages v. Suresh Chand) and has submitted that the rejection of the approval application ipso facto does not render the dismissal order wholly inoperative and the petitioner should take resort to the remedy of raising industrial dispute under S.10 of the Act. As against this Mr. Dave

appearing for the petitioner-workman has placed strong reliance on AIR 1993 S.C. 2430 (S.Ganapathy v. Air India) and has submitted that once it is found that the order of discharge or dismissal is incomplete and inchoate as its approval is refused, there is no effective termination. In S.Ganapathy's case (Supra), the main question for consideration before the Supreme Court was the computation of the amount of one month's wages to be paid under S.33(2)(b) in the context of justification in reducing the amount of statutory tax deduction. In Punjab Beverages case (Supra), the Supreme Court considered the effect of the contravention of S.33(2)(b) and held that in such a case, the workman was not entitled to maintain the application under S.33C(2) of the Act. In the end of para 6 of this Judgment in Punjab Beverages case (Supra) it has been laid down that the scope of inquiry before the Tribunal exercising jurisdiction under S.33 is to decide whether the ban imposed on the employer by this section should be lifted or maintained by granting or refusing the permission or approval asked for by the employer. If the permission or approval is refused by the Tribunal, the employer would be precluded from discharging or punishing the workman by way of dismissal and the action of discharge or dismissal order is taken to be void. But the reverse is not true for even if the permission or approval is granted that would not validate the action of discharge or punishment by way of dismissal taken by the employer and the permission or approval would merely remove the ban so as to enable the employer to make an order of discharge or dismissal and thus avoid incurring the penalty under S.31(1), but the validity of the order of discharge or dismissal would still be liable to be tested in a reference at the instance of the workmen under S.10. Thus, the dictum of the Supreme Court is clear that if the permission or approval is refused, the action of discharge or removal would be void. It is different matter that in case of the permission or approval being granted, the fate of the employee is not sealed and he can still seek his remedy against the dismissal in a Reference under S.10 of the Act. However, in case of rejection of the application for approval of dismissal, it is clear that the dismissal does not become complete, rather it becomes inoperative and, therefore, the concerned workman is entitled to continue in service as if the dismissal order had not been passed. Mr. Patel appearing for the Corporation has submitted that it is a case in which the Assistant Commissioner of Labour has not gone into the merits of the case at all and has declined the approval only on a technical ground of short payment. His submission is that unless and until the

merits of the case are gone into, it can not be said as to whether there was a prima facie case for dismissal or not and by relying on certain observations made in Punjab Beverages's case (Supra) he has submitted that when the workman cannot resort to the remedy of S.33C(2), he also can not enforce reinstatement on account of such rejection of the approval application notwithstanding the question of the short payment and that even for reinstatement or the relief of continuity in service, he should take resort to the remedy of raising an industrial dispute under S.10.

5. Mr. Patel then cited the case of Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma, reported in 1995 SCC (L&S) 5 and has submitted that after considering the cases of Punjab Beverages (Supra) and Strawboard Manufacturing Co. v. Gobind (AIR 1962 SC 1500) and Tata Iron & Steel Co., Ltd. v. S.N. Modak (AIR 1966 SC 380) and after noticing that the decision in S. Ganapathy's case (Supra) has followed the view taken by the Supreme Court in Strawboard Manufacturing Company's case and Tata Iron & Steel Co. Ltd.'s case holding that the order of dismissal passed without the approval under S.33(2)(b) remains in inchoate condition. It has also been noticed by the Supreme Court in Jaipur Zilla Sahakari Bhoomi Vikas Bank's case (Supra) that the decision in S. Ganapathy's case (Supra) was taken without noticing the decision in Punjab Beverages's case (Supra) and that the same point arises in a number of cases and in view of the conflicting decisions, presents difficulty to all the courts and in view of the necessity that the law on the subject is settled for future, the Supreme Court has referred the same to a Bench of 5 Judges and on that basis it has been submitted by Mr. Patel that this court may not proceed to decide the matter finally till the decision is rendered by the Bench of 5 Judges. I have considered the submissions made in this regard. The Punjab Beverages' case was decided by a Bench of 3 Judges of the Supreme Court and in that case, as stated above, it has been clearly laid down in para 6 that in case the permission or approval is refused, the action of discharge or dismissal becomes void and, therefore, the petitioner's right to continue in service can not be made to be defeasible at this stage and the decision of this case can not be deferred till the controversy is decided by a Bench of 5 Judges on the basis of the reference made in Jaipur Zilla Sahakari Bhoomi Vikas Bank Ltd.'s case.

6. Such being the position of law, the question arises as to in the facts and circumstances of this case,

what relief can be appropriately granted to the petitioner. It is a fact that the approval has been declined on the ground of short payment only without going into the merits of the case and it would have been better course had the Assistant Commissioner of Labour also gone into the merits of the case so as to come to a finding as to whether there existed any prima facie case for petitioner's discharge on the basis of the inquiry, which was held by the Corporation. Thus, the merits of the charges, so as to see as to whether there was a prima facie case against the petitioner for discharge or not, are yet to be considered, but the fact remains that in view of the rejection of the approval application, the dismissal order can not be allowed to operate. In the peculiar facts and circumstances of this case, it would, therefore, be appropriate to order the reinstatement of the petitioner in service forthwith since the approval application has been rejected. But so far as the question of the payment of the wages for the intervening period, from the date of the dismissal i.e. 14-10-93 till he is reinstated, is concerned, it may depend upon the final outcome of the findings of the Assistant Commissioner of Labour on the basis of the merits as regards to the existence of the prima facie case for petitioner's discharge and for that purpose the matter deserves to be remanded to the Assistant Commissioner of Labour to pass an order on the approval application after considering the merits of the case as to whether there exist any prima facie case for his discharge.

7. Accordingly this Special Civil Application partly succeeds and is allowed with the following directions:

- (1) The matter is remanded to the Assistant Commissioner of Labour, Bharuch to consider the case on merits with reference to the grounds raised in the application seeking approval and the reply filed by the petitioner opposing the same besides the question of the payment for one month's wages made under proviso to S.33(2)(b) of the Industrial Disputes Act, 1947 after hearing both the sides in accordance with law.
- (2) The petitioner shall be reinstated in service forthwith and shall be allowed to continue in services subject to the final outcome of the remanded proceedings, as above.
- (3) In case the Assistant Commissioner of Labour

ultimately rejects the approval application even on merits, the petitioner shall be paid all the backwages with continuity of service as if the dismissal order had never been passed and in case the Assistant Commissioner of Labour finds that a prima face case existed for passing the order of dismissal against the petitioner, it will be open for the Gujarat State Road Transport Corporation to pass the order afresh after compliance of proviso to S.33(2)(b) of the Industrial Disputes Act, 1947 and in that case, the petitioner shall continue in service till the fresh order is passed and the approval is granted by the Assistant Commissioner of Labour.

8. Special Civil Application is accordingly allowed in part and the Rule is made absolute in the aforesaid terms. No order as to costs.